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3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
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7 JANNETH CASTRO,
8
9 Plaintiff,

10 v.

11 SAXON MORTGAGE SERVICES, INC.,
12 OLD REPUBLIC DEFAULT MANAGEMENT
13 SERVICES, and DOES 1 through 50,
14 inclusive,
15 Defendants.
16 _____/

No. C 09-0030 PJH

**ORDER GRANTING MOTION
TO EXPUNGE; AND DISMISSING
ACTION WITH PREJUDICE**

17 Before the court is defendant Saxon Mortgage Services, Inc.'s ("Saxon") motion to
18 expunge the notice of pendency of action recorded on Janneth Castro's ("plaintiff") real
19 property or, in the alternative, to require plaintiff to post a bond as a condition of
20 maintaining the notice of pendency of action. Plaintiff did not oppose the motion. Nor did
21 she file a statement of non-opposition pursuant to Civil Local Rule 7-3. Also before the
22 court is Saxon's request for an order dismissing this action with prejudice, which plaintiff did
23 not oppose. Because the court finds that oral argument is unnecessary and would not be
24 helpful, the hearing date of April 1, 2009 is VACATED pursuant to Civil Local Rule 7-1(b).
25 For the reasons stated below, the court GRANTS Saxon's motion to expunge and
26 DISMISSES this action with prejudice.

BACKGROUND

27 This action arises out of the initiation of a non-judicial foreclosure sale of real
28 property purchased by plaintiff. Plaintiff is a resident of Alameda County, California and the
owner of real property located at 2058-2060 B Street, Hayward, California 94541 (the
"property"). Compl. ¶ 6. Defendant Old Republic Default Management Services ("Old

1 Republic”) is the trustee pursuant to the deed of trust recorded on July 7, 2006. Id. ¶ 2,
2 Exh. 1. Defendant Saxon is a business entity unknown to plaintiff. Id. Apparently, Saxon
3 is the servicer of plaintiff’s loan.

4 At some unknown time, plaintiff defaulted on the payments due on her loan. Compl.,
5 Exh. 1. On November 25, 2008, a non-judicial foreclosure was initiated when a Notice of
6 Trustee’s Sale was recorded by Old Republic. Id. On December 9, 2008, plaintiff
7 commenced the instant action against Saxon, Old Republic and various unnamed
8 defendants in the Superior Court of California, County of Alameda, generally alleging that
9 Saxon has improperly initiated, or directed Old Republic to initiate, a trustee’s sale of the
10 property. Compl. ¶¶ 2-3, 7-8. Specifically, plaintiff’s complaint alleges three causes of
11 action, asserting that defendants violated: (1) the Fair Debt Collection Practices Act, 15
12 U.S.C. § 1692 *et seq.* (“FDCPA”); (2) California’s Rosenthal Fair Debt Collection Practices
13 Act, Cal. Civ.Code § 1788 *et seq.* (“RFDCPA”); (3) the Real Estate Settlement Procedures
14 Act, 12 U.S.C. § 2601 *et seq.* (“RESPA”); (4) the Home Ownership and Equity Protection
15 Act of 1994, 15 U.S.C. § 1639 (“HOEPA”); (5) the Truth in Lending Act, 15 U.S.C. § 1601
16 (“TILA”), Regulation Z, 12 C.F.R. § 226; (6) the Federal Trade Commission Act, 15 U.S.C.
17 § 41 *et seq.* (“FTC Act”); and (7) the Federal Racketeer Influenced and Corrupt
18 Organizations Act, 18 U.S.C. § 1961 *et seq.* (“RICO”).

19 On January 2, 2009, a notice of pendency of action (“lis pendens”) was recorded on
20 the property in the Official Records of Alameda County, California as Instrument No.
21 2009000721, giving notice that this action “affects title and the right to possession of” the
22 property. Exh. 1, attached to Saxon’s Mtn. to Expunge Notice of Pendency of Action or
23 Require a Bond.¹ On January 6, 2009, this action was removed on the basis of federal
24 question jurisdiction. Saxon moved for dismissal on January 13, 2009. On February 17,
25 2009, Saxon filed the instant motion, seeking an order expunging the lis pendens notice or,
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28 ¹ Although Saxon did not ask this court to take judicial notice of this document, the court
will nonetheless do so given that it is a matter of public record and its accuracy is not subject
to reasonable dispute. See Fed.R.Evid. 201(b); W. Fed. Sav. v. Heflin, 797 F.Supp. 790, 792
(N.D. Cal. 1992).

1 in the alternative, requiring plaintiff to post a bond as a condition of maintaining the lis
2 pendens.

3 On February 24, 2009, the court issued an Order dismissing plaintiff's first through
4 third causes of action for failure to state a claim upon which relief may be granted. The
5 court ordered plaintiff to either file an amended complaint or a statement indicating that she
6 abandoned her remaining claims no later than March 18, 2009. The court also cautioned
7 plaintiff that "[i]f the first amended complaint is either filed untimely or lacks a cognizable
8 claim, this action will be dismissed with prejudice." To date, plaintiff has not filed an
9 amended complaint or a statement indicating that she abandons her remaining claims.

10 DISCUSSION

11 A. Legal Standard

12 Pursuant to California Code of Civil Procedure § 405.20, "[a] party to an action who
13 asserts a real property claim may record a notice of pendency of action [lis pendens] in
14 which that real property claim is alleged." See also Kirkeby v. Superior Court of Orange
15 County, 33 Cal.4th 642, 647 (2004).² The purpose of a lis pendens notice is to provide
16 constructive notice of a pending claim that may affect title or right to possession of the real
17 property described in the lis pendens notice. See La Paglia v. Superior Court, 215
18 Cal.App.3d 1322, 1326 (1989) (setting forth the history and purpose of lis pendens
19 statutes), *abrogated on other grounds* by Lewis v. Superior Court, 19 Cal.4th 1232, 1258
20 (1999); Kirkeby, 33 Cal.4th at 647. "Its effect is that anyone acquiring an interest in the
21 property after the action was filed will be bound by the judgment." BGJ Associates, LLC v.
22 Superior Court, 75 Cal.App.4th 952, 966 (1999).

23 "While the lis pendens statute was designed to give notice to third parties and not
24 to aid plaintiffs in pursuing claims, the practical effect of a recorded lis pendens is to render

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26 ² Section 405.20 provides:

27 A party to an action who asserts a real property claim may record a notice
28 of pendency of action in which that real property claim is alleged. The notice
may be recorded in the office of the recorder of each county in which all or part
of the real property is situated. The notice shall contain the names of all parties
to the action and a description of the property affected by the action.

1 a defendant's property unmarketable and unsuitable as security for a loan. The financial
 2 pressure exerted on the property owner may be considerable, forcing him to settle not due
 3 to the merits of the suit but to rid himself of the cloud upon his title. The potential for abuse
 4 is obvious.' ” Kirkeby, 33 Cal.4th at 651 (quoting La Paglia, 215 Cal.App.3d at 1326); see
 5 also Amalgamated Bank v. Superior Court, 149 Cal.App.4th 1003, 1011 (2007) (A lis
 6 pendens notice “acts as a cloud against the property, effectively preventing sale or
 7 encumbrance until the litigation is resolved or the lis pendens is expunged.”). “Because of
 8 the effect of a lis pendens, ‘[t]he history of the lis pendens legislation indicates a legislative
 9 intent to restrict rather than broaden the application of the remedy.’ ” Kirkeby, 33 Cal.4th at
 10 651 (quoting Urez Corp. v. Superior Court, 190 Cal.App.3d 1141, 1145 (1987)).

11 A property owner may remove an improperly recorded lis pendens by bringing a
 12 motion to expunge. Kirkeby, 33 Cal.4th at 647 (citing Cal. Code Civ.Proc. § 405.30).³
 13 There are several statutory bases for expungement of a lis pendens, including that the
 14 claimant’s (party recording the notice of lis pendens) pleadings, on which the lis pendens is
 15 based, do not contain a real property claim. See Cal. Code Civ.Proc. § 405.31 (“the court
 16 shall order the notice expunged if the court finds that the pleading on which the notice is
 17 based does not contain a real property claim”); see also Kirkeby, 33 Cal.4th at 647 (if
 18 claimant’s pleading does not properly plead a real property claim, the lis pendens must be
 19 expunged); Gale v. Superior Court, 122 Cal.App.4th 1388, 1398 (2004) (unless a pleading
 20 sets forth a real property claim, a notice of lis pendens must be expunged, regardless of
 21 any bond).

22 The question of whether a pleading states a real property claim is tested by a
 23 “demurrer-like analysis” that centers on the adequacy of the pleading. Kirkeby, 33 Cal.4th
 24 at 647-48. Put simply, if a claimant properly pleads a real property claim, she can file a
 25 notice of lis pendens; if she doesn’t, she can’t. Gale, 122 Cal.App.4th at 1395. “[W]hen a
 26 motion to expunge is brought, the burden is on the party opposing the motion to show the

28 ³ Section 405.30 provides, in part: “At any time after notice of pendency of action has
 been recorded, any party, or any nonparty with an interest in the real property affected thereby,
 may apply to the court in which the action is pending to expunge the notice.” Cal. Code
 Civ.Proc. § 405.30.

1 existence of a real property claim.” Kirkeby, 33 Cal.4th at 647 (citing Cal. Code Civ.Proc. §
2 405.30). In addition to alleging a real property claim, the claimant has the burden of
3 establishing the probable validity of that claim. Section 405.32 states that “the court shall
4 order that the notice be expunged if the court finds that the claimant has not established by
5 a preponderance of the evidence the probable validity of the real property claim.” Cal.
6 Code Civ.Proc. § 405.32.

7 B. Analysis

8 The court grants Saxon’s motion to expunge the lis pendens notice. As set forth in
9 this court’s February 24, 2009 Order, plaintiff’s complaint does not allege sufficient facts to
10 state a cognizable claim for relief. Plaintiff did not file an amended complaint correcting the
11 complaint’s deficiencies. Nor did she file an opposition to the instant motion. As such,
12 plaintiff has failed to sustain her burden to properly plead a real property claim and to
13 establish the probable validity of that claim. The lis pendens notice must therefore be
14 expunged.

15 **CONCLUSION**

16 For the reasons stated above, the court hereby GRANTS Saxon’s motion and
17 orders the lis pendens notice expunged. IT IS FURTHER ORDERED that this action is
18 DISMISSED with prejudice. Plaintiff failed to file a timely amended complaint as ordered by
19 the court. Plaintiff had adequate warning that dismissal would result from non-compliance
20 with the court’s order. The Clerk shall close the file.

21 **IT IS SO ORDERED.**

22 Dated: March 27, 2009

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25 **PHYLLIS J. HAMILTON**
26 United States District Judge
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